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No. 3840

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United States
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Circuit Court of Appeals
For the Ninth Circuit.

MURRAY L. MCGREW and FRANK L. BOYD,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED

MAR 25 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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Attorney for Plaintiffs in Error.

JOHN L. SLATTERY, Esq., U. S. Attorney,
RONALD HIGGINS, Esq., Assistant U. S.
Attorney, and W. H. MEIGS, Esq., Assistant
U. S. Attorney, all of Helena, Montana,
Attorneys for Defendant in Error.

In the District Court of the United States in and
for the District of Montana.

No. 3943.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Defendants.

BE IT REMEMBERED, that on December 15,
1921, an Information was filed herein against the
defendants above named, in the words and figures
following, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District
of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Defendants.

Information.

BE IT REMEMBERED, That Ronald Higgins, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 15th day of December, 1921, in the May, 1921, term of court, held at the city of Great Falls, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, one Murray L. McGrew, and one Frank L. Boyd, whose true names are to the informant unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, said Murray L. McGrew and said Frank L. Boyd, whose true names are to the informant [2] unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, said Murray L. McGrew and one Frank L. Boyd, whose true names are to the informant unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of the National Prohibition Act;

In the District Court of the United States, District
of Montana.

UNITED STATES,

Plaintiff,

vs.

F. L. BOYD and L. M. McGREW and ONE
STUDEBAKER AUTO, Model No. 327825;
License, Mont. 38518,

Defendants.

Affidavit of U. W. Hammaker.

U. W. Hammaker, first being duly sworn, deposes and says: That on the 10th day of November, 1921, he was then and is now, duly appointed, qualified and acting Sheriff of Chouteau County, in the State of Montana. Affiant farther deposes and says:

That on the above date, in company with George Campbell, Deputy Sheriff of said county, at a point about (1) mile north of Virgelle, Mont., did stop and look into one Studebaker auto bearing Montana license No. 38516, Model No. 327825, and was found therein ten (10) cases of one pt. bottles of "Pebbleford whiskey," and said liquor being labeled with U. S. Internal Revenue counterfeit stamps, and twenty (20) full quarts of Baird Brothers Imp Scotch whiskey.

Affiant further states, that in said auto were two men who gave there names as Murray L. McGrew and F. L. Boyd and gave there address as Billings,

Montana. Affiant farther states that said Murry McGrew and F. L. Boyd said in the presence of himself and said deputy sheriff, Geo. Campbell, that they had twelve (12) cases of whiskey in said car and farther stated that they got said whiskey at Govenlock, Alberta, Canada and was en route to Billings, Montana, with said whiskey.

Affiant further states that he then and there took into custody the above-named *Deft's* and committed them to jail at Ft. Benton. Stored said car at La Barre garage at said place and now holds whiskey in his custody. [5]

Farther affiant sayeth not.

U. W. HAMMAKER,
Sheriff Chouteau Co.

Subscribed and sworn to before me this 12th day of December, 1921.

L. S. GROFF,
Deputy Collector U. S. I. R.

[Indorsed]: No. 3943. Title of Court and Cause. Affidavits. Filed Dec. 15, 1921. C. R. Garlow, Clerk.

Thereafter, to wit, on December 17, 1921, defendants were duly arraigned, entered pleas of not guilty and case set for trial, the minute entry of same being as follows, to wit: [6]

In the District Court of the United States in and
for the District of Montana.

No. 3943.

UNITED STATES

vs.

MURRAY L. McGREW and FRANK L. BOYD.

Arraignment and Plea.

Defendants present in court this day and being arraigned they answered that their true names are, respectively, Murray L. McGrew and Frank L. Boyd. Thereupon, on motion of J. A. Kavaney, Esq., Court ordered that counsel's name be entered as attorney for defendants. Thereupon the information was read to the defendants, whereupon a plea of not guilty was ordered entered on behalf of each of the said defendants, and the case was set for trial December 20, 1921, at 9:30 A. M. Thereupon Court ordered that the petition for return of personal property and the suppression of the same as evidence, which was heretofore filed by the defendants, would be heard at the time of trial.

Entered in open court December 17, 1921.

C. R. GARLOW,
Clerk.

Thereafter, to wit, on December 20, 1921, the verdict of the jury was duly filed herein, being in the words and figures as follows, to wit: [7]

In the District Court of the United States, District
of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRAY McGREW and FRANK L. BOYD,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the information on file herein.

THOMAS C. FERRIS,
Foreman.

[Indorsed]: #3943. Title of Court and Cause.
Verdict. Filed Dec. 20, 1921. C. R. Garlow, Clerk.

Thereafter, to wit, on December 20, 1921, judgment was duly rendered and entered herein, being in the words and figures as follows, to wit: [8]

In the District Court of the United States in and
for the District of Montana.

No. 3943.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRAY L. McGREW and FRANK L. BOYD,
Defendants.

Judgment.

The United States Attorney with the defendants and their counsel present in court. The defendants were thereupon duly informed by the Court of the nature of the charge against them as appears in the information herein, and of their arraignment and pleas of not guilty, and of their trial and the verdict of the jury of guilty as charged.

And the defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, to which they replied that they had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of the offense of wrongfully and unlawfully transporting intoxicating liquor without first obtaining a permit from the Commissioner of Internal Revenue so to do, and without making at the time a permanent record thereof; and wrongfully and unlawfully having and possessing intoxi-

eating liquor intended for use in violation of the National Prohibition Act, committed on the 10th day of November, 1921, in the County of Chouteau, of the State and District of Montana, as charged in the information herein.

It is therefore **CONSIDERED, ORDERED AND ADJUDGED** that for said offense you, the said Murray L. McGrew and Frank L. Boyd, do pay a single fine of Three Hundred Dollars, and costs taxed at \$79.65, and that you be confined in the Cascade County jail until said fine is paid or you are otherwise discharged according to law. [9]

Thereupon, on motion of defendants, commitment ordered stayed for twenty days for purposes of appeal, and defendants meanwhile released on bond heretofore given, if no appeal taken within that time, defendants to deliver themselves to the Sheriff of Cascade County.

Judgment rendered and entered December 20, 1921.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy.

Thereafter, to wit, on February 20, 1922, bill of exceptions was duly signed, settled and allowed, and filed, being in the words and figures following, to wit: [10]

In the District Court of the United States of
America, for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Defendants.

Proposed Bill of Exceptions.

BE IT REMEMBERED: That on the 15th day of December, A. D. 1921, the Honorable John L. Slattery, United States District Attorney, for the District of Montana, duly empowered to inform of offenses and to prosecute for and on behalf of the Government, on leave of Court first being had and obtained, filed in said court, and information, charging and accusing these defendants with the crime of illegally possessing and transporting intoxicating liquors, and illegally importing the same, which said information is in the words and figures following, to wit:

(Clerk will here insert a copy of the information.)

That thereafter and on the 17th day of December, A. D. 1921, the said defendants, Murray L. McGrew and Frank L. Boyd, in company with their counsel, J. A. Kavaney, appeared before said Court, and they and each of them being required to plead to the allegations of said information, stood mute, whereupon the Court duly entered a plea of "Not guilty." And defendants thereupon filed in said court and cause a duly verified petition for the re-

turn of personal property and the suppression of the same as evidence, which said petition is in the words and figures following, to wit:

(Title of Court and Cause.)

“To the Honorable GEORGE M. BOURQUIN,
Judge of the Above-entitled Court:

Comes now the above-named defendants, and petitions the above-entitled court for the return of certain property, [11] wrongfully held, under a wrongful and illegal seizure, by the officers of this Court, and for the suppression of the same as evidence against these defendants, and as grounds for said petition, on their oath inform this Honorable Court.

That on the morning of November 10th, 1921, at the hour of 2 o'clock A. M., during the night-time, while your petitioners were upon a public highway, in Chouteau County, Montana, to wit, on the highway between Big Sandy, Montana, and the station of Virgille Montana, where the highway passes under the Great Northern Railway, driving an automobile, they were without cause or warning, wrongfully, unlawfully, and without authority assaulted by one U. W. Hammaker, Sheriff of Chouteau County, Montana, and George Campbell, Deputy Sheriff of Chouteau County, Montana, with deadly weapons, the same being a loaded rifle in the hands of the said U. W. Hammaker, and a loaded revolver in the hands of the said George Campbell; that they were compelled to stop, and commanded to hold up their hands above their heads, to leave their car, and while so covered with deadly weapons, they were

forced to submit to a search of their persons, and effects, and that said sheriff and his deputy searched the automobile of these said petitioners, and placed handcuffs upon them, and did then proceed to the City of Fort Benton, Montana, compelling these petitioners to accompany him, and to take possession of all their said property and effects, and that he did then and there and thereupon, and without legal right or authority so to do, imprison said petitioners in the County Jail at Fort Benton, Montana, all which was without warrant or authority of the law, that no complaint had been made or warrant to search or other warrant issued as against these petitioners; that said arrest and seizure on the part of said sheriff and his deputy was wrongfully, unlawful, without warrant or authority, and [12] in contravention of the constitutional rights of these petitioners; and in contravention of Article IV of the Constitution of the United States of America, and in contravention of section 7 of Article III of the Constitution of the State of Montana.

That thereafter and on the 10th day of November, A. D. 1921, in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau, the County Attorney filed an information charging and accusing these petitioners with the crime of illegally possessing and transporting intoxicating liquors, whereupon these petitioners filed in said court their petition demanding the return of said property and the suppression of the same as evidence.

That on the 12th day of December, A. D. 1921, said cause was dismissed by the said District Court, and by order of that date said sheriff was directed to return and redeliver to said defendants the property taken from said petitioners by said sheriff, a copy of which said order is hereto attached, marked Exhibit "A" and by this reference hereto made a part.

That on said date and prior thereto said Sheriff U. W. Hammaker was in communication with the office of Federal Prohibition Law enforcement office at Great Falls, and Helena, Montana, and more particularly one Benjamin Holter and L. S. Groff, the later, who was present at the time of the order of said Court and knew that said order was made, and who through collusion with the said sheriff of Chouteau County, U. W. Hammaker, did refuse and prevent the return and redelivery of said property thus wrongfully taken from these petitioners, but that the said L. S. Groff did wilfully, unlawfully and without warrant therefore, and in contravention of the constitutional rights of these petitioners, arrest the persons, and seize the property of these petitioners, and has [13] since failed and refused to deliver the same to these petitioners, all of which was done without warrant or authority for so doing, and in contravention of Article IV of the Amendments of the Constitution of the United States of America; that said wrong has been a continuing wrong; that the rights of these petitioners *has* been most flagrantly and unwarrantedly violated.

That the property thus wrongfully and unlawfully seized consists of 240 pint bottles or glass containers, filled with liquid and labelled 'Pebble Ford,' 24 glass containers of about 40 ounce size, containing liquid and labelled 'Biard's Scotch,' one 45-caliber Colt's automatic revolver; one 32-caliber Colt's automatic revolver, and certain personal effects together with one seven passenger touring automobile, Studebaker No. 327,825, all of which are illegally and unlawfully held by the said L. S. Groff, the same having been seized without warrant, and without authority on the part of the said L. S. Groff, and in defiance of the orders of the District Court as aforesaid.

WHEREFORE: Your petitioners pray the order of this Court that the said L. S. Groff immediately return to these petitioners all of said property so wrongfully and unlawfully taken from them, which consists of 240 pint bottles or glass containers filled with liquid and labelled 'Pebble Ford,' 24 glass containers of about 40-ounce size, filled with liquid and labelled 'Biard's Scotch'; one 45-caliber Colt's automatic revolver; one 32-caliber Colt's automatic revolver, and certain personal effects, together with one seven passenger touring automobile, Studebaker No. 327,825, all of which are illegally and unlawfully held by said L. S. Groff, having been seized without warrant, or any authority whatsoever and that the action of said L. S. Groff be declared null and void, and of no effect; and that the same and the whole thereof be [14] suppressed as evidence against

these petitioners, for the reason that it is in contravention of the constitutional rights of these petitioners, and in contravention of Article IV of the United States Constitution, and the laws generally relative to search and seizure, and that said officers be enjoined from further molesting these petitioners, or in any wise giving evidence thus wrongfully and unlawfully secured, as against these petitioners.

(Signed) MURRAY L. MCGREW.

(Signed) FRANK L. BOYD."

(Duly verified and filed.)

Filed December 17th, 1921.

Exhibit "A."

"In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau.

THE STATE OF MONTANA,

Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,

Defendants.

ORDER.

On the 10th day of November, 1921, the County Attorney filed information in the above-entitled cause, charging the defendants with illegally possessing and transporting intoxicating liquors.

Now comes the County Attorney and moves the Court to dismiss said information. The Court being advised in the premises, it is by the Court or-

dered that the said motion be and it is hereby granted, and it is ordered that said information be and it is hereby dismissed.

It is further ordered that the property taken by the [15] sheriff from said defendants McGrew and Boyd be returned and redelivered to them, and that the bail fixed by said information be and it is hereby released.

December 12, 1921.

(Signed) JNO. W. TATTAN,
Judge."

That said cause was thereupon set for trial for the 20th day of December, A. D. 1921, on which date at the opening of said court, at its courtroom, in the City of Great Falls, Montana, said cause was regularly called for trial; a jury having been duly and regularly impaneled, and sworn to try said cause, the Court did then excuse said jury, and take up the petition of said defendants and proceed to a hearing of the same; witnesses were sworn and examined, and proof having been offered and heard in support of said petition, and upon the conclusion thereof; the Court denied said petition upon the ground that "It makes no difference how evidence may have been obtained by a sheriff, even though by a wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants," and upon the further ground the "Where liquor is placed in a car and started to move without a permit, it (the liquor and vehicle or

conveyance) immediately becomes forfeited to the Government." To which the defendants by counsel, duly excepted.

The Court did thereupon recall the jury and proceed to the trial of said cause.

Testimony of U. W. Hammaker, for the Government.

U. W. Hammaker, being duly sworn on the part of the Government, testified in substance as follows:

"That on the 10th day of November, 1921, he was the duly appointed, qualified and acting sheriff of Chouteau County, Montana, that on the night of November 9th, between the hours of 11 and 12:30 o'clock in the night, he and his deputy, George Campbell, had been [16] waiting on the highway about one mile north of the station of Virgille. Chouteau County, Montana; they intercepted the defendants as they were proceeding along the highway in an automobile, that they halted them with firearms, and commanded them to leave their car, that Mr. McGrew, appeared to be sick and asked for some coffee, whereupon he replied, 'We have no coffee,' and McGrew stated 'We have some in the car,' and asked me to get it for him, and I told Campbell to get it; he looked in the back of the car and could not find it, and when he came out I asked him what they had in the car and he replied, 'It is loaded with whiskey, we got it in Canada.' (Here counsel for defendants 'objected to any evidence from the witness as to what he found in the

(Testimony of U. W. Hammaker.)

car, for the reason that it had been wrongfully and unlawfully obtained, he not having has a search-warrant or any warrant for the arrest of defendants,' which said objection was by the Court overruled. And defendants duly excepted.)

"Upon being asked if he had tasted any of the liquor he replied, 'No, but I think that Mr. Campbell drank some of it'; he here identified some bottles of liquid as being some of the bottles taken from defendants' car." These bottles were usual whiskey bottles and labeled accordingly, and were admitted in evidence.

Upon cross-examination, the testimony was substantially as follows:

Q. How and why did you arrest these defendants?

A. We were looking for some casings that had been stolen from a garage.

By the COURT.—What cases?

A. Casings, auto tires.

Q. Was that any reason for arresting these gentlemen?

A. We thought that they might have the casings.

Q. Did you know these defendants? A. No.

Q. Then why did you stop them on the highway? [17]

A. We had reason to believe that they might have them.

(Testimony of U. W. Hammaker.)

Q. When you stopped defendants did you compel them to stop?

A. I told them we were officers, and asked them where they were going. McGrew replied "We are going home."

Q. Did you have any firearms?

A. I had a rifle.

Q. Did you level it at the defendants?

A. I did not exactly aim it at them.

Q. As a matter of fact, Mr. Hammaker, you stopped their progress by placing your car in the road, and covering them with guns and compelled them to leave their car, and search their person, did you not?

A. I asked them to get out in the light so as to see who they were.

Q. Did you search their person?

A. When McGrew got in the light I saw a gun in his belt, and told Mr. Campbell to get it.

Q. When you made this arrest you were acting under instructions of the Federal Prohibition officers, were you not?

A. No. They had not told me to arrest these defendants.

Q. But you had been in communication with the Federal Prohibition Law enforcement office at Great Falls and Helena, and they had told you to go ahead and make such arrests and if you were unsuccessful in the prosecution of them in the State

(Testimony of U. W. Hammaker.)

Courts, they would prosecute them in the Federal Courts, did you not?

A. They did not. I had some talk with Holter and he *said was* legitimate to stop and search a car without a warrant. I had no instructions from Federal officers to do so.

Q. As a matter of fact, Mr. Hammaker, you were ordered by the [18] District Court to return and redeliver this property to these defendants, on December 12th, last, were you not? A. Yes.

Q. Did you comply with that order, and why not?

A. Well, it was in possession of the Federal agents.

Q. (By the COURT). Did you return the property to the possession of these defendants?

A. Well, I went to Mr. Kaveney's office, to tell them that they had been released, Mr. Groff told them that he had seized it.

Q. (By the COURT.) Was Mr. Groff with you?

A. Yes, he was there.

Q. (By the COURT.) Did he go there with you?

A. Yes.

Q. You knew that the Court had made the order directing that it be returned and redelivered by you? A. Yes.

Q. But you did not comply with it?

A. It had been seized by the Federal authorities.

Q. As a matter of fact, you had *communicate* with the Federal authorities and asked them to have

(Testimony of U. W. Hammaker.)

a man there at the time that the case was dismissed, to seize this property, and these defendants, did you not? A. No. I don't think that I did.

Q. But you had an officer there at each hearing in the District Court to seize them, in the event that the District Court should release them, did you not?

A. There was a man there at each hearing.

Here counsel for defendants moved to strike out the testimony of the witness and the whole of it, for the reason that it had been wrongfully and unlawfully obtained, the arrest having [19] been made in the night-time without a warrant, and that said seizure was unlawful, and without authority, and that all information was unlawfully secured. Which said motion was by the Court denied, and defendants duly excepted.

Testimony of George Campbell, for the Government.

GEORGE CAMPBELL, being duly sworn to testify on the part of the Government, testified in substance as follows:

“That he was a duly appointed, qualified and acting deputy sheriff of Chouteau County, Montana, on the 10th day of November, 1921, and that said arrest occurred at about 2 o'clock in the morning of November 10th; that he tasted liquor from a bottle that the defendants had with them and that it was whiskey, and upon being shown one of the bottles exhibited, stated that it looked like the bottles taken from the defendants, and that he

looked into the contents of the car, and told Mr. Hammaker that it was liquor."

Here the Government rested.

Whereupon the defense rested, and by counsel made the following motion.

"We move the Court to dismiss said action, for the reason that there is not sufficient evidence before the jury to sustain a verdict of guilty, the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it has been unlawfully and illegally secured, in contravention of the constitutional rights of these defendants." Whereupon the Court ruled that the evidence was not sufficient, but permitted the Government to reopen the case and to introduce the liquor in evidence. To which ruling the defendants duly excepted. [20]

Here the Government reopened their case, recalled Mr. Hammaker, and showing him a bottle, sealed with his name upon it (exhibits bottle to witness) asked him what it was, and he replied, "That is one of the bottles taken from the car of the defendants"; upon being asked what the writing on it was, stated, "That is my name placed there by myself for the purpose of identification." The bottle was then introduced in evidence, to which defendants objected, on the ground that it had been unlawfully secured by reason of an unwarranted search and seizure, the same having been made without a search-warrant, or any warrant, in contravention of the constitutional rights of these defendants. Which said objection was by the Court overruled, and defendants duly excepted.

The jury, thereupon returned a verdict of guilty, as charged, and the Court imposed a joint fine of (\$300.00) Three Hundred Dollars.

That said defendants having claimed error of the Court, in denying said petition of defendants; and in permitting the testimony of the sheriff to be introduced; and in permitting the reopening of the case after the same had been closed; and in permitting the liquor to be introduced in evidence, the same having been unlawfully and unwarrantedly seized; and in refusing to dismiss said action for failure of the evidence; and in permitting the jury to return a verdict upon the evidence thus offered; and in entering judgment upon the verdict, and having excepted to each of said rulings, and because the matters and things heard and considered in the premises, are not made manifest by the records in said action, this bill of exceptions is made and presented in order to preserve a true and correct record of said matter.

J. A. KAVANEY,
Attorney for Defendants.

Dated at Fort Benton, Montana, December 30th,
1921. [21]

Certificate of Judge to Bill of Exceptions.

State of Montana,
County of Lewis and Clark,—ss.

I, George M. Bourquin, the Judge of the United States District Court, for the District of Montana, Division of Great Falls, do hereby certify that I am the Judge before whom the proceedings

had in the above-entitled matter was heard, and the petition of the above-named defendants was presented.

That the foregoing, as by me corrected to conform to facts and my minutes of the evidence, consists of a full, true and correct bill of exceptions of said petition and proceedings had in said matter, and the rulings and denials thereof, and that the same contains all matters and things considered therein, and that this bill of exceptions was presented in due season, and is hereby settled, allowed and signed as a fair and full, true and correct bill of exceptions on said petition and the denial thereof, and the proceedings thereafter had and the rulings thereon.

WITNESS my hand this 20th day of February, A. D. 1922.

BOURQUIN,
Judge of the United States District Court. [22]

In the District Court of the United States of
America for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRAY L. McGREW and FRANK L. BOYD,
Defendants.

**Affidavit of J. A. Kavaney of Mailing of Bill of
Exceptions.**

State of Montana,
County of Chouteau,—ss.

J. A. Kavaney, being first duly sworn, on his oath deposes and says that he is the attorney for the defendants in the above-entitled action.

That on the 30th day of December, A. D. 1921, he duly deposited in the United States Postoffice at Fort Benton, Montana, a copy of the proposed bill of exceptions, hereto attached, in an envelope duly sealed, and with sufficient postage thereto attached, and said envelope being addressed to the United States District Attorney, at Helena, Montana.

That at said time there was a regular communication by mail between the Cities of Fort Benton, Montana, and Helena, Montana.

Further affiant sayeth not.

J. A. KAVANEY.

Subscribed and sworn to before me this 30th day of December, A. D. 1921.

[Seal]

H. S. MCGINLEY,
Notary Public for the State of Montana, Residing
at Fort Benton, Montana.

My commission expires December 5th, 1922.

Filed Feb. 20, 1922. C. R. Garlow, Clerk.

That on January 9, 1922, petition for writ of error was duly filed herein, being in the words and figures following, to wit: [23]

In the District Court of the United States of
America for the District of Montana.

AT LAW.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,

Appellants in Error.

Petition for Writ of Error.

Comes now the defendants Murray L. McGrew and Frank L. Boyd, and says that on the twentieth day of December, A. D. 1921, judgment in this case was entered by this court in favor of the plaintiff and against these defendants, by which said judgment defendants were aggrieved, in that in said judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of these defendants, all of which will appear more in detail from the assignment of errors filed with this petition.

WHEREFORE defendants pray that a writ of error may issue to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to said Circuit Court of Appeals.

Dated January fifth, A. D. 1922. ·

J. A. KAVANEY,

Attorney for Defendants.

Filed Jan. 9, 1922. C. R. Garlow, Clerk.

That on January 9, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [24]

In the District Court of the United States of
America for the District of Montana.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Appellants in Error.

Assignment of Errors.

State of Montana,
County of Chouteau,—ss.

J. A. Kavaney, being duly sworn, says that he is the attorney for Murray L. McGrew and Frank L. Boyd, the defendants named in the above-entitled cause; that judgment in said action was rendered in the above-entitled court by the Honorable George M. Bourquin, the Presiding Judge of said Court, on the twentieth day of December, 1921, at the courtroom of said Court, in the City of Great Falls, Montana, finding said defendants guilty as charged, and imposing a fine of Three Hundred (\$300.00) Dollars, and costs, jointly. That

on the seventeenth day of December, 1921, defendants herein filed in said court and cause their duly verified petition for the return of personal property and suppression of the same as evidence, which said petition was by said Court denied. That this deponent is grieved by the erroneous decision of said Judge in said action, in matters of law and procedure, in the proceedings of said Judge in said action, which errors and procedures are as follows, to wit:

1st. That the said Court erred in refusing to grant said petition for return of personal property and suppression of the same as evidence, pages 2, 3, 4, and 5 of said bill of [25] exceptions. Article IV, Amendments to the Constitution of the United States.

2d. That said Court erred in ruling that: "It makes no difference how evidence may have been obtained by a sheriff, even though by wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants," and upon the further ruling that, "Where liquor is placed in a car and started to move without a permit (the liquor and vehicle, or evidence) becomes forfeited to the Government."

3d. That the Court erred in allowing U. W. Hamaker, sheriff, and George Campbell, deputy sheriff, who made the wrongful seizure, to testify relative to the contents of said car or to give evidence in said case where the information was wrongfully obtained.

4th. The Court erred in refusing to strike out

the evidence of said U. W. Hammaker, for the reason that it was wrongfully and unlawfully obtained, he not having a search-warrant or any warrant for the arrest of said defendants, and evidence being as follows:

“That on the 10th day of November, 1921, he was the duly appointed, qualified and acting sheriff of Chouteau County, Montana; that on the night of November 9th, between the hours of 11:00 and 12:30 o’clock, in the night, he and his Deputy, George Campbell, had been waiting on the highway about one mile north of the station of Virgelle, Chouteau County, Montana, they intercepted the defendants as they were proceeding along the highway in an automobile, that they halted them with firearms, and commanded them to leave their car; that Mr. McGrew appeared to be sick and asked for some coffee, whereupon he replied, ‘We have no coffee,’ and McGrew stated, ‘We have some in the car,’ and asked me to get it for him, and I told Campbell to get it; he looked in the back [26] of the car, and could not find it, and when he came out I asked him ‘What they had in the car’ and he replied, ‘It is loaded with whiskey.’

Upon being asked if he had tasted any of the liquor, he replied, ‘No, but I think that Mr. Campbell drank some of it.’ He here identified some bottles of liquid as being some of the bottles taken from defendants’ car.

Upon cross-examination, the testimony was substantially as follows:

Q. How and why did you arrest these defendants?

A. We were looking for some casings that had been stolen from a garage.

By the COURT.—What cases?

A. Casings, auto tires.

Q. Was that any reason for arresting these defendants?

A. We thought that they might have the casings.

Q. Did you know these defendants?

A. No.

Q. Then why did you stop them on the highway?

A. We had reason to believe that they might have them.

Q. When you stopped defendants did you compel them to stop?

A. I told them we were officers, and asked them where they were going. McGrew replied, 'We are going home.'

Q. Did you have any firearms?

A. I had a rifle.

Q. Did you level it at the defendants?

A. I pointed it at them.

Q. As a matter of fact, Mr. Hammaker, you stopped their progress by placing your car in the road, and covering them with guns and compelled them to leave their car, and searched their person, did you not? [27]

A. I asked them to get out in the light so as to see who they were.

Q. Did you search their persons?

A. When McGrew got in the light I saw a gun in his belt, and told Mr. Campbell to get it.

Q. When you made this arrest you were acting under instructions of the Federal prohibition officers, were you not?

A. No. They had not told me to arrest these defendants.

Q. But you had been in communication with the Federal Prohibition Law Enforcement office at Great Falls, and Helena, and they had told you to go ahead and make such arrests and if you were unsuccessful in the prosecution of them in the State Courts, they would prosecute them in the Federal Courts, did you not?

A. I don't just remember.

Q. Did you not talk to one Benjamin Holter and L. S. Groff, Prohibition Officers of the Federal Courts, about this, and agree that you were to act in consort?

A. We had talked some about it.

Q. As a matter of fact, Mr. Hammaker, you were ordered by the District Court to return and redeliver this property to these defendants, on December 12th last, were you not?

A. Yes.

Q. Did you comply with that order, and why not?

A. Well, it was in the possession of the Federal Agents.

Q. (By the COURT.) Did you return the property to the possession of these defendants?

A. Well, when I went to Mr. Kavaney's office, to tell them that they had been released, Mr. Groff told them that he had seized it.

Q. (By the COURT.) Was Mr. Groff with you? A. Yes, he was there.

Q. (By the COURT.) Did he go there with you? [28] A. Yes.

Q. You knew that the Court had made the order directing that it be returned and redelivered by you? A. Yes.

Q. But you did not comply with it?

A. It had been seized by the Federal authorities.

Q. As a matter of fact, you had communicated with the Federal authorities and asked them to have a man there at the time that the case was dismissed, to seize this property, and these defendants, did you not?

A. No, I don't think that I did.

Q. But you had an officer there at each hearing in the District Court to seize them, in the event that the District Court should release them, did you not?

A. There was a man there at each hearing."

5th. That said Court erred in refusing to grant defendant's motion for a dismissal of said action upon the Government resting its case and defendant's motion: "We move the Court to dismiss said action for the reason that there is not sufficient evidence before the jury to sustain a ver-

dict of guilty, the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it, has been unlawfully and illegally secured, in contravention of the constitutional rights of these defendants," whereupon the Court permitted the Government to reopen said case and introduce the liquor in evidence.

6th. That the Court erred in permitting the introduction of said liquor in evidence, over defendant's objection, "That it had been unlawfully secured by reason of an unwarranted search and seizure, the same having been made without a search-warrant, or any warrant in contravention of the constitutional rights of these [29] defendants."

7th. That said Court erred in permitting said jury to return a verdict of guilty upon the evidence thus introduced.

8th. That said Court erred in entering said verdict and judgment thereon.

WHEREFORE defendants pray that said judgment be reversed and said cause dismissed.

J. A. KAVANEY,
Attorney for Defendants.

Subscribed and sworn to before me by the said J. A. Kavaney, this 7th day of January, A. D. 1922.

[Seal] H. S. MCGINLEY,
Notary Public for the State of Montana, Residing
at Fort Benton, Montana.

My commission expires on the 5th day of December, 1922.

Filed Jan. 9, 1922. C. R. Garlow, Clerk.

That thereafter, on February 20th, 1922, order allowing writ of error was duly filed herein, being in the words and figures following, to wit: [30]

In the District Court of the United States of America for the District of Montana.

THE UNITED STATES OF AMERICA,
Respondent in Error,
vs.

MURRAY L. McGREW and FRANK L. BOYD,
Appellants in Error.

Order Allowing Writ of Error.

Desiring to give petitioner an opportunity to test in the United States Circuit Court of Appeals for the Ninth Circuit the questions presented in the foregoing petition,—

IT IS ORDERED, that a writ of error be allowed to said Court, and that the same may be made a supersedeas, the bond in the penal sum of Five Hundred (\$500.00) Dollars herewith being approved.

IN TESTIMONY WHEREOF, witness my hand this 20th day of Feb., A. D. 1922.

BOURQUIN,
Presiding Judge of the United States District Court, for the District of Montana.

Filed Feb. 20, 1922. C. R. Garlow, Clerk.

That thereafter, to wit, on February 23, 1922, citation was duly filed herein, the original citation being hereto annexed and being in the words and figures following, to wit: [31]

In the District Court of the United States of America for the District of Montana.

THE UNITED STATES OF AMERICA,
Respondent in Error,
vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Appellants in Error.

Citation on Writ of Error.

To the United States of America, and to the Honorable JOHN L. SLATTERY, United States District Attorney for the District of Montana,
GREETINGS:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States, for the District of Montana, wherein Murray L. McGrew and Frank L. Boyd are appellants in error and you are respondent in error, to show cause, if any there be, why the judgment rendered against the appellants in error as in said writ of error mentioned should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

BOURQUIN,

Judge of the United States District Court, for the
District of Montana.

Feb. 20, 1922.

Service accepted and copy received this 23d day
of Feb. 1922.

RONALD HIGGINS,

Asst. U. S. Atty.,

District of Montana. [32]

[Endorsed]: #3943. In the District Court of the United States of America for the District of Montana. The United States of America, Respondent in Error, vs. Murray L. McGrew and Frank L. Boyd, Appellants in Error. Citation. Filed Feb. 23d, 1922. C. R. Garlow, Clerk of the United States District Court. [33]

Thereafter, to wit, on February 23, 1922, writ of error was duly filed herein, the original writ of error being hereto annexed and being in the words and figures following, to wit: [34]

In the District Court of the United States of
America, for the District of Montana.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Appellants in Error.

Writ of Error.

To the President of the United States, and to the
Honorable the Judge of the District Court of
the United States of America, for the District
of Montana, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you, between the United States of America, plaintiff, and Murray L. McGrew and Frank L. Boyd, defendants, a manifest error hath happened, to the great damage of the said Murray L. McGrew and Frank L. Boyd, as by their assignment of error appears, we being willing that error, if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit within thirty (30) days from the date hereof, that the records and proceedings aforesaid [35] being inspected, the said Circuit Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of Amer-

ica, the 20th day of February, in the year of our Lord one thousand nine hundred twenty-two.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court for the District of Montana.

Allowed by:

Service accepted and copy received this 23d day of Feb. 1922.

RONALD HIGGINS,

Asst. U. S. Atty., District of Montana. [36]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify under the seal of the said District Court of the United States, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy. [36½]

[Endorsed]: #3943. In the District Court of the United States of America, for the District of Montana. The United States of America, Respondent in Error, vs. Murray L. McGrew and Frank L. Boyd, Appellants in Error. Writ of Error. Filed Feb. 23d, 1922. C. R. Garlow, Clerk of the United States District Court. [37]

That on February 20, 1922, supersedeas bond on writ of error was duly filed herein, being in the words and figures following to wit:

In the District Court of the United States of America, in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,
Defendants.

Supersedeas Bond on Writ of Error.

United States of America,
United States District of Montana,—ss.

We, Murray L. McGrew and Frank L. Boyd, residing at Billings, and Martin J. Curtis and Theo. Schultz, residing at Billings, in the State of Montana, acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements,

upon this condition: That if the said Murray L. McGrew and Frank L. Boyd, the defendants, upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals for the Ninth Circuit and is now pending, shall be and appear at the District Court of the United States for the Great Falls Division, District of Montana, upon the determination of the proceedings on said writ of error, and the receipt and filing of a writ of mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or, within five days thereafter, to answer and obey whatever final order or judgment except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

MURRAY L. MCGREW. (L. S.)

[Seal] FRANK L. BOYD. (L. S.)

MARTIN J. CURTIS. (L. S.)

THEO. SCHULTZ. (L. S.)

[38]

Taken, acknowledged and subscribed this 7th day of January, A. D. 1922, in open court.

[Seal] RAY ANDERSON,
United States Commissioner.

United States of America,
District of Montana,—ss.

Martin J. Curtis, a surety on the annexed recognizance, and Theo. Schultz a surety thereon, being duly sworn, depose and say that Martin J. Curtis

resides at Billings, Montana, and Theo. Schultz resides at Billings, Montana, both in the county of Yellowstone in said district; that they are freeholders in the *county Yellowstone*, District of Montana; that Martin J. Curtis is worth the sum of Two Thousand Dollars and Theo. Schultz is worth the sum of Two Thousand Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real estate and improvements thereon, located in Billings, Montana, and Custer, Montana, respectively.

(Affiants' signatures:) MARTIN J. CURTIS.
THEO. SCHULTZ.

Sworn to and subscribed before me this 7th day of
January, A. D. 1922.

[Seal] RAY ANDERSON,
United States Commissioner as Aforesaid.

This recognizance approved this 7th day of January, 1922.

[Seal] RAY ANDERSON,
U. S. Commissioner.

[Indorsed]: No. 3943. Title of Court and Cause.
Supersedeas Bond on Writ of Error. Filed Feb.
20, 1922. C. R. Garlow, Clerk. [39]

**Certificate of Clerk U.S. District Court to Transcript
of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States Dis-

trict Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 39 pages, numbered consecutively from 1 to 39 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of \$16.25, and have been paid by the plaintiffs in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 3d day of March, A. D. 1922.

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy Clerk. [40]

[Endorsed]: No. 3840. United States Circuit Court of Appeals for the Ninth Circuit. Murray L. McGrew and Frank L. Boyd, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the District
of Montana.

Filed March 6, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.